

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 6163 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE R.BALIA.

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1. Whether Reporters of Local Papers may be allowed to see the judgements? Yes
2. To be referred to the Reporter or not? Yes
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?
3 to 5 No

GHANHYAMBHAI NABHERAM

Versus

STATE OF GUJARAT

Appearance:

MR KS JHAVERI for Petitioner

Mrs. S.D. Talati, AGP for Respondents

CORAM : MR.JUSTICE R.BALIA.

Date of decision: 03/09/98

ORAL JUDGEMENT

1. Rule. Mr. S.D. Talati, learned AGP waives service of rule.

2. The facts leading to filing of this petition are

that one Shakaraji who was a co-sharer of land comprised in Block No. 215 admeasuring 2 acres 33 gunthas executed a will on 1st March, 1986 in favour of the present petitioner to the extent of his share therein. Said Shakaraji died on 7th October, 1986. The petitioner has claimed mutation in the land records in his favour on the basis of the said will. On 1st July, 1987, the entry No. 1692 was amended to that effect. On 18.2.1989, the Deputy Collector initiated proceedings for revising the said alteration under the Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947 (hereinafter called the "Act of 1947"). By Order dated 22nd August, 1989, the Deputy Collector cancelled the entry No. 1692 on the ground that as the petitioner has acquired the land by way of a will which has resulted in sub-division of the block in breach of the provisions of the Act of 1947 and as the legatee is also not an agriculturist to whom any transfer could be made in view of Section 63 of the Bombay Tenancy Act, amendment in entry No. 1692 is liable to be cancelled.

3. The petitioner appealed before the Collector against the said order. The Collector rejected the appeal of the petitioner. The petitioner applied to the State Government for revision. The State Government, vide its order dated 31.12.1992 found that deceased Shakaraji has made will in favour of the petitioner land admeasuring 1.25 bigas of his share in block No. 215 and the petitioner has acquired the land as a successor of said Shakaraji. It further held that land is of a block and the petitioner has been granted land by dividing the block without previous permission required under the Act, which amounts to breach of Act of 1947 as well as the petitioner is not an agriculturist and before acquisition, no permission was sought under Section 63 of the Tenancy Act and it also is in breach of the Bombay Tenancy Act. It agreed that deceased has right to make a will in respect of his property but not so as to commit breach of any of the statutes. In that view of the matter, the revision was rejected on 21st December, 1992.

4. Aggrieved with the aforesaid orders, petitioner has filed Special Civil Application No. 4928 of 1993 which was decided on 6th September, 1994. The court found that the respondent No.1 in exercise of his revisional powers under Section 211 of the Bombay Land Revenue Code has declared the adjoining piece of land not to be a fragment which is practically of similar in size meaning thereby the present piece of land may also not fall within the definition of fragment being of the same size of the adjoining land and released from the

provisions of the Prevention of Fragmentation Laws. As the Tribunal has not taken into consideration the fact the order was set aside and the Tribunal was directed to decide the revision afresh in the light of that order.

5. In pursuance of the aforesaid direction, the revision of the petitioner was decided by impugned order dated 21st May, 1998, affirming the previous order. It was pointed out to the revisional authority that block in question was of a joint tenancy and the deceased has willed only his share of the land in question to the petitioner and thus the petitioner became a joint tenant of the block in place of the deceased. No sub-division has taken place as the joint block has not so far been divided nor any attempt was made to divide the same. Therefore, no breach of the law relating to sub-division has occurred. The respondent authority agreed with the said contention. However, for the first time, the revisional authority raised doubt about the validity of will that the purpose of the will being to confer a status of an agriculturist on the petitioner who is alleged to be not agriculturist prior to the acquisition of the land through his testamentary disposition. On this ground, he found that as the petitioner was conferred with the status of agriculturist on devolution of the land by succession, there being no prior permission, it results in breach of Section 63 of the Tenancy Act because Will has not been executed without prior permission of the competent authority and a document which has resulted in conferring the status of agriculturist on a non-agriculturist, it required prior permission under Section 63 of the Tenancy Act. On this ground, the order of the authorities below were upheld and revision has been dismissed. Hence this petition.

6. Learned counsel for the petitioner urges firstly that the order now made by the revisional authority is beyond the scope of direction contained by this court vide order dated 6th September, 1994 referred to above limiting consideration of the revision on remand to the issue referred to in the said order. It was also urged that execution of will and its validity was not being the foundation of initiating revisional proceedings, at no time, the petitioner was called upon to establish its genuineness. The revisional authority could not have deviated from the premises on which the earlier orders have been made. It was also urged that transmission of interest of a deceased by succession whether intestate or testamentary does not result in breach of any provision of the Act of 1947 or the Bombay Tenancy Act as has been held in earlier order of the revisional authority.

7. Learned counsel for the state supported the order, inter alia, on the ground that as doubts have been raised about the intention for executing the will, an entry made on that behalf, would not be sustained unless execution of will has been duly proved in appropriately instituted proceedings.

8. After carefully considering the rival contentions, I am of the opinion that the ground raised by learned counsel for the petitioner is well founded.

9. It has been noticed above that consistently from the time of recording amendment in the land records, the name of the petitioner as cotenant of block No.215 to the extent he acquired interest of the deceased, until after the matter came before this court in Spl. C.A. No. 4928 of 1993 no doubt about the due execution of the will in favour of the petitioner by the deceased Shakaraji has been raised. On the contrary, the proceedings have taken place on the premises that execution of said will cannot result in transfer of any interest validly in favour of the petitioner unless same was executed after obtaining previous sanction of the Collector under Sections 43 and 63 of the Bombay Tenancy Act or under Section 31(2) of Act of 1947. Even now doubt is not about genuineness or execution of the will but contention is that intention of executing the will is to vest property in a non-agriculturist, it cannot be given effect to unless it is executed with prior permission of the Collector.

10. There is no dispute that on death of a tenant or holder of land, his interest is heritable and liable to vest by succession. It is also nobody's case that a non-agriculturist is disqualified to be an heir. So much so that in its order dated 4th May, 1994 State Government recorded in specific term that deceased has right to provide for his succession after his death, that is not considered as transfer.

11. Vesting in any person, of an agricultural land by succession does not result in breach of Section 43 of the Bombay Tenancy Act or Section 7 of the Prevention of Fragmentation and Consolidation of Holdings Act, 1947 or Section 73 of the Land Revenue Code. In fact the reference was made by the Tribunal to the stand taken by next kith and kin of the deceased that they had no objection about the vesting of the property in petitioner under the will, that is to say, natural heirs, who would otherwise have succeeded to the property in case of intestate succession and have been deprived of their

inheritance has no doubt or contention about due execution of will, which certainly lends support to its genuineness. The revision was rejected only on the ground that it resulted in sub-division of the block in breach of Sec. 31(2) of the Act of 47 and in transfer of land to non-agriculturist in breach of Section 63 of the Bombay Tenancy Act in the absence of previous permission. 10. With this background, the revisional authority while considering the application as per direction of the court has certainly not applied his mind to direction contained in that order. It has not at all addressed itself to the question whether the block No.214 at all can be considered as fragment so as to invite attraction to the provisions of the Act of 1947.

12. That apart on merit also, it is apparent that the Act of 1947 or Bombay Tenancy Act has no application to transmission of interest of holder on his death to his successor by any mode of succession of lands held by tenants. Revenue Laws dealing with agricultural lands have not made the lands uninheritable. They also do not disqualify a non-agriculturist from inheritance nor a number of persons are disentitled from succeeding to estate of an agriculturist as body of successors, which may result in well defined definite share of the estate of deceased vesting in them individually.

13. The laws do not provide any special mode of succession in respect thereof. In absence of special provision, the succession will be governed by personal law applicable to deceased. The deceased was a Hindu and succession to his interest on his death is governed by Hindu Succession Act which acknowledges both the modes of the succession, namely, testamentary and intestate. The result of death is that interest of deceased immediately vests in his successors whether recognised as heirs on intestate succession; or as per the direction in the will as legatees. Vesting is not postponed and is not as a result of any agreement or transaction inter vivos. It takes place by operation of law. It is not the case of the State Government that on the death of the tenant if he is a joint tenant of a block, the succession would be in a different mode. It is also not the case of the State that if the will had not been executed the land would not have vested in the heirs of the deceased as per the law of inheritance applicable to deceased. It also cannot be doubted and disputed that only such interest shall vest in successor as was of the deceased. The position cannot be different in the nature of intestate succession and testamentary succession. In case of intestate succession also an heir may or may not be

agriculturist. In case of one or more of heirs being nonagriculturist, he can not be deprived of his inheritance. So also a legatee can be a non-agriculturist and he too will succeed only to the interest of the deceased whether was held by the deceased as individual or as joint tenant with other co-tenant. In either event, the vesting of the property in successor cannot be denied.

14. The authorities under the two statutes are not vested with power to deny recognition of vesting of such interest on succession. If vesting of the property in a non-agriculturist to the extent interest of a co-sharer in the joint holding is to be recognised and given effect to in the case of intestate succession the position cannot be altered merely because the successor happens to be a legatee acquiring right under a will. It may further be noticed that a person has power to dispose of only that much of property by testamentary disposition which is capable of being disposed of by him. That is to say a will can only relate to the extent a deceased has disposable interest in the property and not beyond it. A joint holder of a tenancy has only interest in part of the tenancy. May be that until it is divided into metes and bound he holds jointly with other sharers. On his death succession is to his share in the joint tenancy. Only the interest of deceased shareholder vests in his heirs or legatees under testamentary disposition as the case may be and such successor or successors becomes a joint tenant with the surviving sharers. But this substitution does not result in sub-division of the property unless partitioned by all the joint holders. Nor it is a transfer of property inter vivos so as to invite the operation of Section 31 of the Act of 1947 or Section 63 or 64 of the Bombay Tenancy Act.

15. Viewed in that light, the orders of the Deputy Collector and Collector and of the State under revision cannot be sustained. The incident and incidence of death of a holder of tenancy rights, whether solely or jointly is not controlled by these provisions.

16. In the result the petition succeeds. The orders dated 22nd August, 1989 passed by the Deputy Collector, Ahmedabad and the order dated 4th January, 1991 passed by the Collector and the order dated 4th May, 1998 passed by the State Government cancelling the entry in favour of the petitioner dated 21st July, 1987 are quashed. The original order dated 21st July, 1987 making changes in the Land Records in respect to Entry No. 1692 is

restored. Rule is made absolute. There shall be no
order as to costs.

p.n.nair